



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG - 1 2006

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: 316(b) Phase III Regulations: Petition for Review Filed by Surfrider Foundation

FROM: Steven M. Neugeboren *Steven M. Neugeboren*
Associate General Counsel
Water Law Office (2355A)

TO: Benjamin H. Grumbles
Assistant Administrator for Water (4101M)

Enclosed is a copy of a petition for review, filed on July 6, 2006, by the Surfrider Foundation in the U.S. Court of Appeals for the Ninth Circuit. At issue is EPA's final action on regulations to establish requirements for cooling water intake structures under section 316(b) of the CWA at Phase III facilities. See 71 Fed. Reg. 35006 (June 16, 2006). The Surfrider Foundation's filing indicates that the petitioners propose to challenge EPA's consideration of costs and benefits in reaching its final decision on the Phase III rule, as well as challenge EPA's action more generally as arbitrary and capricious.

This is the third petition EPA has received challenging the Phase III decision. The other two petitions were filed by Massachusetts Public Interest Research Group, in the First Circuit, and by Riverkeeper, in the Second Circuit.

I have assigned this case to Robert Stachowiak of my staff. He can be reached at (202) 564-0580.

Attachment

cc:

Via e-mail w/Attachment:

Brent Fewell
Michael Shapiro
Ephraim King
Suzanne Rudzinski
Mary Smith

Jim Hanlon
Jane Moore
Linda Boornazian
Doreen Vetter
Louise Wise

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

2006 JUL -6 PM 1:29

FILED
DATE INITIAL

SURFRIDER FOUNDATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, and STEPHEN
L. JOHNSON, in his Official Capacity as
Administrator of the Environmental
Protection Agency,

Respondents.

Case No.

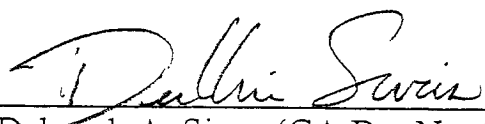
PETITION FOR REVIEW

PETITION FOR REVIEW

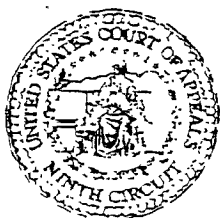
Pursuant to Section 509(b)(1) of the federal Clean Water Act, 33 U.S.C. § 1369(b)(1), and Rule 15 of the Federal Rules of Appellate Procedure, Surfrider Foundation hereby petitions this Court for review of final action of respondent United States Environmental Protection Agency, entitled *National Pollutant Discharge Elimination System – Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase III Facilities*, published at 71 Fed. Reg. 35006 - 35046 (June 16, 2006) (“Phase III Rule”) [Agency Docket No. OW-2004-

0002]. For purposes of judicial review, the final Phase III Rule was promulgated on June 30, 2006. A copy of the final Phase III Rule is attached to this petition.

Respectfully submitted this 6th day of July, 2006.

By: 
Deborah A. Sivas (CA Bar No. 135446)
Holly D. Gordon (CA Bar No. 226888)
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Attorneys for Petitioner SURFRIDER
FOUNDATION



OFFICE OF THE CLERK
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
2006 JUL -6 PM 1:30

USCA DOCKET # (IF KNOWN)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CIVIL APPEALS DOCKETING STATEMENT

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL: SURFRIDER FOUNDATION, Petitioner, v. UNITED STATES ENVIRONMMNETAL PROTECTION AGENCY, and STEPHEN L. JOHNSON, in his Official Capacity as Administrator of the Environmental Protection Agency, Respondents	DISTRICT: Not Applicable JUDGE: Not Applicable	
	DISTRICT COURT NUMBER: Not Applicable	
	DATE NOTICE OF APPEAL FILED: July 6, 2006	IS THIS A CROSS-APPEAL? <input type="checkbox"/> YES
	IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):	

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW: This is an original proceeding under section 509(b)(1) of the federal Clean Water Act, 33 U.S.C. Section 1369(b)(1), to review final action of the U.S. Environmental Protection Agency entitled "National Pollutant Discharge Elimination System — Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase III Facilities," which was published at 71 Fed.Reg. 35,006 (June 16, 2006) and promulgated for purposes of judicial review on June 30, 2006.

PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:

See Addendum A

PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POSTJUDGMENT MOTIONS):

Massachusetts Public Interest, et al. v. U.S. Environmental Protection Agency
 U.S. Court of Appeals for the First Circuit Docket No. 06-2000
 Riverkeeper, Inc., et al. v. U.S. Environmental Protection Agency
 United States Court of Appeals for the Second Circuit, Docket No. Pending

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

- ☐ Possibility of settlement
- ☐ Likelihood that intervening precedent will control outcome of appeal
- ☐ Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify) _____
- ☐ Any other information relevant to the inclusion of this case in the Mediation Program _____
- ☐ Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges

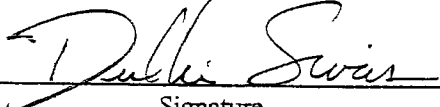
LOWER COURT INFORMATION

JURISDICTION		DISTRICT COURT DISPOSITION	
FEDERAL	APPELLATE	TYPE OF JUDGMENT/ORDER APPEALED	RELIEF
<input checked="" type="checkbox"/> FEDERAL QUESTION	<input type="checkbox"/> FINAL DECISION OF DISTRICT COURT	<input type="checkbox"/> DEFAULT JUDGMENT	<input type="checkbox"/> DAMAGES: SOUGHT \$ _____ AWARDED \$ _____
<input type="checkbox"/> DIVERSITY	<input type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT	<input type="checkbox"/> DISMISSAL/JURISDICTION	<input type="checkbox"/> INJUNCTIONS:
<input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY):	<input type="checkbox"/> DISMISSAL/MERITS	<input type="checkbox"/> PRELIMINARY
	<input type="checkbox"/> OTHER (SPECIFY): Petition for Review of Final Agency Rule	<input type="checkbox"/> SUMMARY JUDGMENT	<input type="checkbox"/> PERMANENT
		<input type="checkbox"/> JUDGMENT/COURT DECISION	<input type="checkbox"/> GRANTED
		<input type="checkbox"/> JUDGMENT/JURY VERDICT	<input type="checkbox"/> DENIED
		<input type="checkbox"/> DECLARATORY JUDGMENT	<input type="checkbox"/> ATTORNEY FEES. SOUGHT \$ _____ AWARDED \$ _____
		<input type="checkbox"/> JUDGMENT AS A MATTER OF LAW	<input type="checkbox"/> PENDING
		<input checked="" type="checkbox"/> OTHER (SPECIFY): Petition for Review of Agency Rule	<input type="checkbox"/> COSTS: \$ _____

CERTIFICATION OF COUNSEL

I CERTIFY THAT:

- COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.
- A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2). See Addendum B
- A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.
- I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.


Signature

July 6, 2006

Date

COUNSEL WHO COMPLETED THIS FORM

NAME: Deborah A. Sivas

FIRM: STANFORD LAW SCHOOL ENVIRONMENTAL LAW CLINIC

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FAX: (650) 723-4426

THIS DOCUMENT SHOULD BE FILED IN THE DISTRICT COURT WITH THE NOTICE OF APPEAL
IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS

SURFRIDER FOUNDATION, Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
STEPHEN L. JOHNSON, in his Official Capacity as Administrator of the
Environmental Protection Agency, Respondents

Civil Appeals Docketing Statement

ADDENDUM A -- Principal Proposed Issues to be Raised on Appeal:

- 1) Whether EPA's final decision not to promulgate national categorical regulations for Phase III existing facilities violates the plain language of sections 316(b) and 301 of the federal Clean Water Act and was statutorily unauthorized because the Act prohibits EPA from basing its regulatory decision on monetized cost-benefit analysis, and whether EPA's decision in this case was in excess of statutory authority, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
- 2) Whether EPA's *National Pollutant Discharge Elimination System – Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase III Facilities* are otherwise in excess of statutory authority, arbitrary, capricious, an abuse of discretion, or not in accordance with law.

SURFRIDER FOUNDATION, Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
STEPHEN L. JOHNSON, in his Official Capacity as Administrator of the
Environmental Protection Agency, Respondents

Civil Appeals Docketing Statement

ADDENDUM B – Service List

Administrator Stephen L. Johnson
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Washington, D.C. 20460
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Facsimile: Unknown

Respondent

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Respondent

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